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New York C. P. A. §48(5) (Laws of 1920, C. 925) 3, 4-5, 23, 27, 28

New York Debtor & Creditor Law §243 (L. 1936 c. 222) 31

New York Personal Property Law §33, subd. 2 (L. 1936, c. 281) 31

Title 28, U. S. Code §1254(1) 2

Texts Cited

4 Fletcher Cyc. Corporations §1442, p. 115 32

Gordon, "The Common Question, Class Suit under the Federal Rules and in Illinois" (1947) 42 Ill. L. R. 518 18

Kalven & Rosenfield, "The Contemporary Function of the Class Suit" (1941) 8 U. of Chi. L. R. 684.. 18, 20

Keeffe, Levy & Donovan, "Lee Defeats Ben-Hur" (1948) 33 Corn. L. Q. 327 18

McGovney, "A Supreme Court Fiction", 56 Harv. L. R. 1090, 1111-5 20

McLaughlin, "The Mystery of the Representative Suit", 26 Georgetown L. J. 878 18

Moore "Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft", 25 Georgetown L. J. 551, at 571 17

3 Moore's Federal Practice, 2d ed. ¶23.11 [4] p. 3468.. 19, 22

3 Moore's Federal Practice, 2d ed. ¶23.07 [1] at p. 3425 24

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Proceedings of American Bar Assn. Institute on Federal Rules, 1938, p. 264 17

Restatement, Restitution, pp. 23, 523..... 27

Restatement, Restitution, §160 comment "i", p. 649..20-21

3 Scott on Trusts, §462, §462.3, pp. 2318-19; §508.2, p. 2438; §518, p. 2484 21

Federal Rules Cited

Federal Rules of Civil Practice:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

ALBERT G. DICKINSON,

Petitioner,

against

E. LEWIS BURNHAM and JAMES A. VAUGHAN, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Albert G. Dickinson, respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, in the above entitled case, entered June 24, 1952, affirming interlocutory and final judgments of the District Court for the Southern District of New York, entered April 10, 1947 and August 3, 1948, in the sum of $408,949.57 in favor of respondents and against petitioner and defendant, Fred B. Lloyd, and affirming certain intermediate orders.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit (R. 1069) filed on June 24, 1952 has not been reported. One of the opinions of the District Court is in part reported at 11 Fed. Rules Serv. 489; see also *id.* 885.

Jurisdiction

Jurisdiction to issue the writ requested is found in Title 28, United States Code, §1254(1).

Questions Presented

1. Rule 23(a) of the Federal Rules of Civil Practice provides, so far as is here relevant:

Rule 23. Class Actions

> (a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the Court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
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> • • •
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> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
>
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

(a) Is a class action on behalf of subscribers to a stock subscription agency, to recover secret profits allegedly obtained out of the subscription monies by breach of fiduciary duty and fraud and deceit, a "spurious" class action [F. R. 23(a)(3)] as held by the District Court, or a "hybrid" class action [F. R. 23(a)(2)] as held by the Court of Appeals, where the object of the action was solely money judgments, there was no "specific property involved", or

in the custody of the Court, and there was neither allegation, proof nor finding of the existence at the time of suit, of the monies allegedly misappropriated seventeen years before?

(b) If a "spurious" class action, do constitutional and statutory limitations on federal district court diversity jurisdiction, permit members of the class, their rights being several, to intervene after interlocutory judgment in favor of the class generally, and recover individual judgments, despite the failure to plead or prove diversity citizenship or that their respective claims were in a jurisdictionally sufficient amount?

(c) In either view, was the District Court empowered (1) to bar the claims of absent members of the class who failed to intervene, or withdrew after intervening, to whom registered mail notice had been sent advising them of the interlocutory judgment in favor of the class, and giving them opportunity to intervene and assert their claims, but containing no warning that in event of failure to do so, their claims would be barred, and (2) to award the total amount of the barred claims, including those of the members who did not receive the notice, *pro rata* to the members of the class who appeared and prosecuted their claims?

(d) New York Civil Practice Act, §48(5) (Laws of 1920, c. 925) provides:

> "Actions to be commenced within six years. The following actions must be commenced within six years after the cause of action has accrued:
>
> • • •
>
> 5. An action to procure a judgment on the ground of fraud. The cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud."

The Court of Appeals of the State of New York has held that in an action based upon fraud, begun more than six years after the acts constituting the fraud, the burden of proof rests upon the plaintiff, in order to overcome the defense of limitations, to prove that he first discovered the facts within six years before suit. In a class action to procure a judgment on the ground of fraud, instituted in a New York federal district court more than seventeen years after the fraud, did each member of the class, intervening after interlocutory judgment in favor of the class generally, have the burden of proving when he discovered the facts, or did he take *prima facie* the dates of discovery open to the class representative, thereby imposing upon the defendant the burden of rebutting such presumption, which he would not have if the interveners had brought separate suits on their several claims?

(e) Did the defendant to a class action to recover secret profits allegedly obtained as a result of breach of fiduciary duty and fraud and deceit, seeking and resulting in money judgments only, have a right to jury trial and to an examination before trial as to the claims of members who intervened after interlocutory judgment in favor of the class generally, with respect to issues raised by defendant's answer to each claim and particularly with respect to claimant's reliance upon the alleged misrepresentation, his contemporaneous notice and knowledge of the facts and the time of his discovery of the alleged fraud; or if such issues were adjudicated by the interlocutory judgment, was such interlocutory judgment erroneous in determining, not only the common questions of law and fact, but also such issues, personal to each member of the class, including those who had not theretofore intervened, and some who never intervened?

2. Where, under the decisional law of the forum, the state statute of limitations (New York Civil Practice Act,

§48(5) *supra*, p. 3) governing fraud actions, does not apply unless the essence of the action is actual, common-law fraud as distinguished from constructive fraud, is an action by subscribers to a stock subscription agency, to recover secret profits obtained by petitioner out of the subscription monies through breach of fiduciary duty, converted into an action for actual fraud within the statute, on the theory, unnecessary to the recovery, that the subscribers were induced to subscribe by statements as to the use to which the subscriptions were to be put, which statements were false in that the subscriptions were used for the profit of the petitioner?

3. Where subscribers to a stock subscription agency for a corporate reorganization seek the recovery of alleged secret profits paid out of subscription monies by the Agent to petitioner in connection with the resale of a plant, formerly owned by the old corporation, which had been purchased by petitioner, a non-fiduciary, with his own means, for a large sum, at a lien foreclosure sale, are the subscribers charged, as a matter of law, with contemporaneous notice and knowledge of such payments to petitioner, on the grounds that the documentary evidence establishes that the Subscribers were expressly informed, by recitals in the subscription agreements or by letter (a) of the lien foreclosure sale; (b) the purchase of the plant by petitioner; (c) the plan to repurchase it for the new corporation through the Agent, with Subscribers' payments; (d) the subscription agreements authorized the Agent, without restrictions, to apply the monies paid thereunder for the acquisition of said plant or an interest therein; (e) the Subscribers were informed that as of a specified date there was due a balance for "liens" to be paid by the Agent in the amount approximately then due petitioner under the agreement by the Agent to pay petitioner the face amount of the liens for the plant; and there is neither finding nor

proof that any subscriber was misinformed as to the terms of the purchase or sale by petitioner, and 158 of the 161 subscribers failed to testify, and the overwhelming majority of both the boards of the old and the new companies and the bondholders protective committee which sponsored the reorganization, were large subscribers?

4. Does a release to one joint tort feasor fail to operate as a release to the others, merely because as to them, it was gratuitous?

5. Where a stock subscription agency is created by an insolvent corporation to raise capital and finance its operation, and the corporation is thereafter reorganized, the agency continuing for the subscription for stock of the new corporation, the agent being irrevocably authorized by the subscribers to expend the monies received for corporate purposes pending its organization, and thereupon to turn the balance over to the corporation, and accept stock therefor for the subscribers, and at and after its formal organization the agent turned over to such new corporation all of the unexpended monies received by him, and corporation issued and the subscribers thereafter received stock for the total amount of monies paid to the agent, and with knowledge of the facts since 1938, they have retained said stock and have not rescinded their subscriptions, does the cause of action to recover the subscription monies allegedly fraudulently misappropriated by the agent and paid the petitioner during such reorganization belong to the new corporation or to the subscribers?

Summary Statement

A. History of the Litigation

In 1938, plaintiff-petitioner, Albert G. Dickinson, commenced an action in the United States Court for the Southern District of New York, against the defendant Lloyd and others, to impress an equitable lien upon certain stock of Petroleum Conversion Corporation issued in the name of Lloyd. The complaint was dismissed but judgment was reversed on appeal and a new trial ordered (*Dickinson* v. *Rinke*, 132 Fed. 2d 805; see, also, *Dickinson* v. *Rinke*, 132 Fed. 2d 884). After remand, in 1944 Burnham and Vaughan, on behalf of themselves and other Subscribers to a subscription agency for the stock of Petroleum and its predecessor, Knox Process Corp., were allowed, on consent of plaintiff, to intervene. They attacked the issuance of stock involved in plaintiff's action, and pleaded a counterclaim for the recovery of $87,310.28 for secret profits realized in 1926 through breach of fiduciary duty. Petroleum also intervened, making the same general allegations and demands for relief. The triangular controversy was tried and in 1947 a decree was entered dismissing the claims of plaintiff and Petroleum and awarding a judgment in favor of the class generally in the sum of $176,245.24 with interest from 1926 (R. 319).[1] Dickinson appealed from this judgment (R. 591-3); Petroleum did not.

Pursuant to said judgment, notice was sent to the 159 absent members of the class to intervene and assert their claims; 32 were not located (1513); 83 intervened and filed claims (1512-13), but 13 thereafter withdrew (1517-18; R. 1075). In accordance with the order granting intervention (R. 323-25), petitioner interposed an answer to the

[1] Figures in parentheses refer to folio numbers unless preceded by the letter "R" indicating pages of the record.

individual claims (R. 416-21) and demanded a jury trial (R. 421) and served notice to take the individual depositions of certain of the new intervenors (R. 428). The jury demand and said notice to take depositions were vacated (R. 445; R. 422). A trial of the issues raised by plaintiff's answer was had (1524). A final decree was entered in 1948 granting Vaughan and Burnham and the 70 other claimants, individual judgments for the full $176,245.24 plus interest totaling $408,949.57 (R. 581-90). Both Dickinson and Petroleum appealed from this judgment (R. 1071). Dickinson's motion to dismiss Petroleum's appeal was denied (*Dickinson* v. *Mulligan*, 173 Fed. 2d 738). This Court granted certiorari (*Dickinson* v. *Petroleum Conversion Corporation*. 338 U. S. 811) and the dismissal of Petroleum's appeal was ordered (338 U. S. 507).

On Dickinson's appeal, the Court of Appeals for the Second Circuit affirmed the interlocutory and final judgments in favor of the Subscribers who intervened and certain intermediate orders appealed from (R. 1069-82).

B. The Facts

The documentary and uncontroverted evidence shows: Knox Process Corporation ("Knox" hereafter), a Delaware corporation was organized in 1923 (615-16) to develop a pilot-plant tested oil cracking patent (2639, at p. 38 of Exh. 113), which ultimately proved a failure for commercial purposes (2153-54). A million dollars had been invested and lost in a predecessor, U. S. Gasoline Mfg. Corp., organized in 1921 (613-14). Knox sold $890,000 of bonds at 95 (623), but by the end of 1924 it was acutely insolvent (629; 1938-39; 1975; 2057; 2297; 2417; 2494). Its sole assets consisted of the patent, 143 acres of land at Texas City, Texas, and on a part thereof, a commercially inoperable oil cracking plant based on the patent (618;

627-29). These assets were covered by a mortgage securing the bond issue (255; 617; 2348). Upwards of $160,000 of mechanics liens had been filed against the plant (18; 145-16; 295; 2534).

At this point the company turned to the petitioner, Dickinson, who had, by mail (2081), purchased and paid for $20,000 of Knox bonds, one of the largest single sales (623). He was never a Knox officer, director or employee (648). In November, 1924, the Knox Board gave Lloyd, authorized to call himself "Acting President"[2] (628), *carte blanche* to make any contract he deemed advisable with Dickinson in connection with a plan for the refinancing of the liens, the company's most pressing problem (642). Lloyd made various propositions to induce Dickinson to buy in the liens, upon the assurances of profit and that he, with the knowledge of the company would be Dickinson's trustee and watch over Dickinson's investment (2420; 2426; 2454-58; 2465-66; 2475; 2478; 2483). Knox, used Dickinson's credit standing and cooperation to obtain a temporary stand-off arrangement with the lienors (2493-94; 304). And, in express consideration of Dickinson's services, it voted Dickinson 20,600 shares of its then and ever after worthless but potentially valuable stock (1973; 2502).[3] In March, 1925, Dickinson and Lloyd entered into a Knox stock-pooling agreement (2374-82). The stock pool consisted of Dickinson's 20,600 shares and Lloyd's 80,000 shares, promotion receipts to which he was entitled in connection

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[2] There was no such office (3153).

[3] Simultaneously, Knox proposed to Dickinson, and Dickinson accepted its proposal, that if he acquired any of the liens, he would surrender the same to the company in exchange for its stock at par, for the cash used by him in the acquisition thereof (292, 293, 2499, 2635). [He was expressly under no obligation to buy in (2501, 2796) and never succumbed to this stock selling scheme.]

with the U. S. Gasoline Mfg. Corp. reorganization resulting in Knox (263-67; 299-300; 2442; 2489; 2621; *Dickinson* v. *Rinke*, 132 Fed. 2d 805, 806).[4]

In the meantime, in December, 1924, the company determined to raise immediately another $600,000 of capital (478; 2592; 2738-39; 2753), but less than $30,000 was obtained in the two months following (635). At the end of February, to avoid seizure of the new monies by Knox creditors (19; 20), the so-called "Rinke Agency" was created pursuant to a Knox Board resolution (288-92; 629). Instead of having the funds paid to Knox, they were to be paid to its attorney and director Rinke, under stock subscription agreements[5] authorizing Rinke to make expenditures thereof to carry on the company's business pay its obligations, operate and improve the plant, and buy in or liquidate the liens thereon (2723-33).

The form of these stock subscription agreements, providing for installment payments[6] had to be repeatedly altered and made more attractive to the investor. Each new form contemplated the subscription of the then balance of the $600,000 (631).

But the receipts were hardly adequate to "keep the doors open", that is, maintain and improve the plant, pay the staff of engineers, etc., and maintain the New York office (2011-13). The bill for electricity at the plant alone

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[4] Significantly, Dickinson was given complete discretion over the pool (2377-81) although he had suggested merely an equal division (300; 2511-12). For Lloyd's curious explanation, see fol. 312. By such methods Lloyd had already so wormed himself into Dickinson's good graces, that Dickinson entered with Lloyd into the so-called Ozokerite deal [having nothing to do with this action (299)] wherein Lloyd obtained an equal interest but Dickinson put up all the monies (301; 2513).

[5] The Knox authorized capital stock was increased to 1,200,000 shares, par value $5 each (693, 1886, 2561).

[6] Each subscription was a separate and individual contract between the subscriber and Rinke and was payable without regard to any other subscriptions; none of the subscribers was given a right or interest in the monies paid by any other subscriber; no provision was made for a common fund (2723-57).

ran about $4,000 a month (2386). In June 1925 the bondholders formed a Protective Committee with full powers to reorganize Knox (662). The investors' interest petered out (2804). The third Agency form of subscription produced $800 (638). On October 28, 1925 the judgment of lien foreclosure was entered for $174,620.56 (297) and a sale of the plant and fifty acres adjoining was ordered (654-55; 2331-33; 2339; 2344-45). The Rinke Agent bank balance three days after the judgment, was $21,946.40 (1942) exclusive of $4,000 borrowed from Dickinson and others, in order to carry on (654; 1944-46; 1974; 2654). His monthly balances during the preceding months had been even less (1942).

Some months before, in July, 1925, Dickinson had inquired whether, if he bought in the liens for half cash and half Knox stock at par, the company or the Agent would (when financially able, of course) buy back the liens at face amount in cash (318-19). In response, Rinke suggested that such arrangement be between Dickinson and himself as Agent, the liens, when paid for, to be surrendered to the company for stock to the Subscribers (319-20). He informed Dickinson that "the directors and also the substantial subscribers to the Agency account all thoroughly comprehend that someone is to buy up the liens and then sell them to me as Agent at face amount"[7] (320).

Dickinson, however, did not act on this proposal to buy in the liens. Instead, five months later, in December 1925, he bought in the plant at the lien foreclosure sale (297, 2781-82) for the amount of the lien foreclosure judgment, and paid half thereof, $87,310.28 in cash, and undertook together with Lloyd (their stock being pooled) to deliver

[7] Of the 161 subscribers (1024-46) 18 who paid almost half of the total subscriptions (2784), men of outstanding business and professional experience (2518-20) were the overwhelming majority of both the Boards of the old and new companies (2281-2; 2709) and of the Bondholders Protective Committee (662) which sponsored the reorganization (2746-7).

one year later, a like amount of stock at par of either Knox or the new company acquiring the property[8] (657-58; 2285-87; 2290-2303; 2567).

Rinke's free net balance just before the sale on November 30, 1925, was $32,668; at the end of December, it was $5,000 less (653-54). There was no finding by the trial court that Rinke, as Agent, in December, 1925, at the time of the sale or before, had the means to equal Dickinson's bid or even the cash portion thereof.

Simultaneously, but unbeknown to Dickinson (340-44; 2136-38) the Bondholders Protective Committee had secured judgment foreclosing the mortgage on the patent and balance of the Knox assets (245; 344; 666). His bid had been made on the assumption that Knox was to continue (2782). Indeed, only two weeks before, the Knox stockholders had authorized an increase in the capital stock from $6,000,000 to $10,000,000 (2764-72). The Committee, however, immediately knew of the lien foreclosure sale and Dickinson's purchase (2577). The Committee members were all large Agency Subscribers and 3 of the 5 were Knox directors (662-64).

The general plan for the reorganization of the enterprise, made necessary by the mortgage foreclosure, was first outlined to Dickinson after the acceptance of his bid (343, 346) as follows: a new company was to be organized; the Bondholders Committee was to acquire, through Rinke as its Agent (2577) at the mortgage foreclosure sales, the former Knox assets other than the plant and property purchased by Dickinson; Dickinson was to sell the plant and land acquired by him to Rinke, as Agent, and to receive therefor out of future Agency funds, $174,620.56, the face amount of the liens for which he had bought in the prop-

[8] Lloyd in a partial accounting to Dickinson took credit for the stock delivered and to be delivered by him to the lienors (2621-2).

erty, and Rinke, as Agent, and the Bondholders Committee would then transfer to the new company, all the former Knox assets. The distribution of stock thereof would be "equitable to everyone interested", including the Knox Bondholders (344), and presumably the Subscribers, and of course, Dickinson (2585) and Lloyd who held under their stock-pooling agreement, about 100,000 Knox shares (263-67; 299-300; 2442; 2489; 2621). Dickinson made his agreement with Rinke in accordance with the plan above described (2596-2610).

To implement the plan for reorganization, a fourth form of Agency agreement was issued, under the sponsorship of the Bondholders Committee. It informed the Subscribers of the sale of most of Knox's physical assets (the plant and 50 acres) at the lien foreclosure sale and the imminent mortgage foreclosure sales of the balance of the Knox properties. Rinke was irrevocably authorized to apply the monies paid thereunder, for the acquisition of the former Knox properties for the new company, the improvement and continued operation of the plant pending the reorganization, and to accept stock of the new company at par for such monies, both expended and unexpended (2746-49). An amendment to the second Agency agreement by the Subscribers thereof, had specifically authorized Rinke to acquire the plant with subscription payments from the purchaser, whoever he would be, at the lien foreclosure sale (351-52; 1937-38; 2734-35). The amount to be paid for the plant or other Knox properties was not limited by any of the subscription agreements. Nor was there any restriction as to profits to the vendor, Dickinson, a non-fiduciary (594). No proof was adduced nor is there any finding that any of the Subscribers were misinformed as to the agreement with Dickinson for the payment to him of the amount of the liens. 158 of the 161 Subscribers failed to testify.

The new company, Petroleum Conversion Corp., a Delaware corporation, with an authorized capital stock of 1,200,000 shares, par value $5 each, was incorporated in March but not formally organized until December, 1926 (667-68). During the intervening period the venture struggled to obtain the balance of the $600,000 (639). Rinke's receipts for each of six of the first seven months of 1926 were less than his disbursements (2777-78; 2808). On July 1, 1926 Rinke had less than $5,000 on hand (480).[9]

Then, a fifth form of Agency agreement, giving the Subscribers "two for one" (2752-57), *i.e.* two Petroleum shares for each $5.00 paid, plus a direction by the Bondholders Committee to give the past Subscribers the same "two for one" (2594-95), plus Dickinson's underwriting of the subscription of the then balance of the $600,000 by pledging the unpaid amount of the $174,000 due him (2632-35), resulted in the subscription of the balance of said $600,000 during the next five months except for the sums collected in 1927 (1941; 1997-99).

After the subscription had been completed and Dickinson had been paid in instalments $174,620.56 for the plant[10] during a period of about 11 months (659-61), and Rinke had turned over to the company the unexpended balance of the Agency receipts (458-61; 1930-34; 1941; 1964; 2398; 1997-99), Petroleum, nominally in exchange for the former Knox properties owned by Rinke, as Agent, and by Dickinson, voted the issuance of all of its authorized capital

[9] In a letter of that date to the subscribers asking for additional subscriptions he pointed to the facts that Petroleum was to acquire the plant, with Agency funds; that the plant had been purchased at the lien foreclosure sale by Dickinson with his own funds and "guarantees" (to the lienors) (479).

[10] For delay in payment of the first $87,000, Dickinson asked for and was paid interest thereon at a rate equal to the amount he had to pay his bank on a loan to finance the cash part of the purchase price paid by him for the plant (387-8); the second $87,000 was paid directly to Lloyd and he remitted only $30,000 thereof to Dickinson (661-2).

stock (675; 2267-71) so as to distribute its stock to make it a "replica of the Knox Process Corporation in financial structure" (269-75) on a "two for one" basis.

Thus, Rinke, as Agent of the Subscribers, was voted and received a certificate for 240,000 shares, par value $1,200,000, exactly twice the $600,000 subscribed (508-9; 681; 1981), and as Agent of the Bondholders Committee, 350,400 shares, par value $1,752,000, exactly twice the face amount of the $876,000 of Knox bonds deposited with the Committee (23; 2311-16). The balance of 609,600 shares was voted to Dickinson, pursuant to plan, to obtain issued stock, 140,000 shares going to the treasury (2229; 2240); about 350,000 to certain Knox stockholders and creditors (270-1; 275; 373; 379; 380; 432; 2261; 2720). The balance remaining approximates on a "one for one" basis the 100,000 Knox shares to which Lloyd and Dickinson were entitled at the time of their stock-pooling agreement (*supra*, pp. 9-10; 681; 1523-24). Actually, Dickinson at no time received any part of the stock voted to him (687-90). The Rinke Agency Subscribers, however, in 1937 did receive separate certificates for their Petroleum stock (494) and each of them executed a general release to Rinke (734-37; 2407-12). The stock has been retained with knowledge of the facts allegedly discovered in the latter part of 1938 (29) and the releases were not rescinded. In 1938, after a settlement of mutual claims and exchange of general releases, Petroleum elected Dickinson a director (716-19). In 1948 it was adjudicated a bankrupt. *In re Petroleum Conversion Corp.* (*Vaughan*), 99 Fed. Supp. 899.

C. The Decisions Below

The District Court granted judgment in favor of the Subscribers on the ground that the monies paid to Dickinson and Lloyd had been misappropriated to them through

the connivance of their fiduciary Rinke for which the Subscribers got nothing; it held the Subscribers did not discover the facts until 1938; that the claim did not belong to Petroleum; and that the action was not barred by the statute of limitations. The defense of the release given to Rinke by the Subscribers was also overruled. The District Court held that the suit on behalf of the Rinke Agency Subscribers was a spurious class suit within the provisions of Federal Rule 23(a)(3) (516-21; 1414-16; 1733-34). It found compliance with diversity jurisdictional requirements even though neither Vaughan nor Burnham nor the subsequent intervenors pleaded or proved diversity citizenship, and none, other than Vaughan, pleaded a claim in a sufficient jurisdictional amount, and in almost all instances such claims are for less than the jurisdictional amount. (Vaughan and Burnham amended the pleadings, and the record on appeal, by leave of the Court of Appeals by adding a conclusory affidavit of citizenship (R. 1055-68). The trial court also barred the claims of the 89 non-appearing Subscribers and awarded the amount of such claims *pro rata* to the 72 Subscribers who appeared.

The Circuit Court of Appeals affirmed the judgment below on the merits, by reason of the "clearly erroneous" rule [F. R. 52(a)], although it recognized that Dickinson's "exculpatorily innocent interpretation of the events" was based upon "the documentary and uncontroverted evidence" (R. 1071; R. 1074).

As to the procedural issues it upheld the adjudication below as to the jurisdictional, *res judicata* and due process questions but on the ground that the action was a hybrid class action [F. R. 23(a)(2)] to recover property held in constructive trust (R. 1078-79). As to the *vacatur* of petitioner's demand for jury trial of the personal issues relating to the subsequent intervenors and of the notice for

their examination before trial, it was held that the issues were *inter se* the intervenors and that the class suit was an equity device (R. 1080). The defense of the release given by the class to Rinke was overruled on the ground that it cannot avail Dickinson and Lloyd as to whom it was gratuitous (R. 1080), and as to the statute of limitations, it was held that this was an action for common law fraud which did not accrue until discovery of the facts, on a new theory that the subscribers were induced to subscribe by statements as to the use to which the subscriptions were to be put, which were false in that they were used to profit the petitioner (R. 1080-81).

Reasons Relied on for Allowance of Writ

A

1. The opinion of the Circuit Court of Appeals attests that "Dickinson's appeal raises important questions both substantive and procedural" (R. 1071). Among the latter are the issues arising out of the class suit procedure. These bring to the fore complex jurisdictional and due process problems which long have troubled the profession and the courts. Fifteen years ago, Professor Moore wrote:

> "The law on class actions is inextricably bound up with jurisdiction and the binding effect of the judgment, and because of these complexities is in a confused state."[11]

Federal Rule 23(a) does not and was expressly not intended to resolve these problems.[12] The intervening years have

[11] Moore *"Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft"*, 25 Georgetown L. J. 551, at 571.

[12] Proceedings of American Bar Assn. Institute on Federal Rules 1938, p. 264.

failed to resolve the confusion. Class suits are still described as "this wilderness".[13] That "the task of pigeonholing operative facts into one of the three categories as a 'true', 'hybrid' or 'spurious' suit has baffled both courts and commentators,"[14] is illustrated by a conflict between upper and lower courts on the same state of facts,[15] and indeed, in this very case itself, where the trial court's considered and repeated judgment (516-21; 1414-16; 1733-34) that this was a spurious class action, was discarded by the Court of Appeals, and the counterclaim denominated a hybrid class action (R. 1076, 1078).

2. This determination raises novel questions of federal law of widespread importance which should be settled by this court.

The decision below, it is submitted, runs counter to the provisions of Federal Rule 23(a)(2) itself and is probably in conflict with the applicable decisions of this Court with respect to the constitutional principles involved. It turns in part upon the substantive law of constructive trusts (R. 1078). In that phase, it decided an important question of local law in a way probably in conflict with applicable local decisions by the highest courts.

In contrast to the requirements of a hybrid class action, as set forth in Federal Rule 23(a)(2) wherein "the object

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[13] Keeffe, Levy & Donovan, *"Lee Defeats Ben-Hur"* (1948), 33 Corn. L. Q. 327.

[14] Note, *"Federal Class Actions: A Suggested Revision of Rule 23"* (1946), 46 Col. L. R. 818, 822-3; see, also, McLaughlin, *"The Mystery of the Representative Suit"*, 26 Georgetown L. J. 878; Kalven & Rosenfield, *"The Contemporary Function of the Class Suit"* (1941), 8 U. of Chi. L. R. 684; *Gordon, "The Common Question Class Suit Under the Federal Rules and in Illinois"* (1947), 42 Ill. L. R. 518.

[15] *Deckert v. Independent Shares Corp.* (E. D., Pa.), 39 Fed. Supp. 592, 123 Fed. 2d 979.

of the action is the adjudication of claims which do or may affect specific property involved in the action", the object of this action is solely money judgments (32-33), and such was the relief granted (1754-70). There is here no "specific property involved". Certainly not in the sense of the typical hybrid class action,[16] a creditor's bill for the receivership of an insolvent debtor's property. *Gibson* v. *Shufeldt*, 122 U. S. 27.

A hybrid class action, though an *in personam* suit as to the determination of the several claims of the members of the class, is an *in rem* proceeding as to the specific property in the custody of the court.[17] Absent such property in *custodia legis*, an action on behalf of the class whose rights are several, is merely a spurious class action, and there is then wanting ancillary jurisdiction. *Hoffman* v. *McClelland*, 264 U. S. 552, 558; *Fulton* v. *Hozier*, 267 U. S. 276, 820. Only in the exercise of ancillary jurisdiction may a District Court within the confines of the constitutional and statutory limitations upon its jurisdiction permit, in non-federal cases, a failure to comply with diversity jurisdictional requirements by intervening claimants whose rights are several. *Stewart* v. *Dunham*, 115 U. S. 61; *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, 87, fn. 4; and it is on this basis that the Court of Appeals below sustained the District Court's jurisdiction for the adjudication of the claims of the subsequent interveners in this class suit despite the fact that they neither pleaded (1014-16; 1020-23; 1485-88) nor proved diversity citizenship, or that their separate claims were in a jurisdictionally sufficient amount,

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[16] See Notes of Advisory Committee on Rules, Rule 23(a) (clause 2).

[17] 3 *Moore, Federal Practice*, 2d ed., ¶ 23.11 [4], p. 3468.

although such would have been their burden had they brought separate suits.[18]

3. The Court of Appeals predicated its holding upon the ground that the District Court had "tak(en) charge of the fund" consisting of the monies allegedly misappropriated in 1926, "in the hands of the" petitioner (R. 1078), although there is neither finding nor proof that the 1926 payments were segregated, or were even in existence at the time of suit in 1944. But says the Court "what we have here is proper(t)y in constructive trust by reason of fraud" on the Subscribers (R. 1078). This conclusion appears to be directly in conflict with *St. Louis & S. F. R. R.* v. *Spiller,* 274 U. S. 304, which held that a constructive trust does not apply to monies illegally obtained by defendant, where such monies were not shown to have been segregated and are not identifiable at time of suit. "It may have been spent", said the Court, at page 310.

"A constructive trust no longer continues when the person chargeable as trustee no longer holds the property or other property which is its product." Restatement, *Restitution,* §160, comment "i", p. 649. That the existence of

[18] The Court of Appeals tacitly acknowledged the validity of petitioner's contention that in a spurious class action the existence of diversity jurisdiction as between the class representatives and the defendants to the class suit, is insufficient to sustain jurisdiction as to the claims of subsequently intervening class members, since a spurious class action is merely a joinder device and "is in effect but a congeries of separate suits so that each claimant must, as to his own claim, meet the jurisdictional requirements". *Steele* v. *Guaranty Trust Co.* (2d Cir.), 164 Fed. 2d 387, 388; *Newsom* v. *E. I. Dupont DeNemours* (6th Cir.), 173 Fed. 2d 856; see, *Andrews* v. *Equitable Life Assurance Society* (7th Cir.), 124 Fed. 2d 788 (MINTON, J.) and cases therein cited.

The District Court's distinction between original parties and subsequent interveners (418) is without validity since an intervener is for all intents and purposes an original party. *Richmond* v. *Irons,* 121 U. S. 27; *In Re: Raabe Glissman Co.,* 71 Fed. Supp. 678, 680 (D. C., N. Y., S. D., LEIBELL, J.). The "original party" approach has properly been labeled a trick for escape from the constitutional limitations on District Court jurisdiction. Kalven & Rosenfield, *"The Contemporary Function of the Class Suit"* (1941), 8 U. of Chi. L. R. 684 at 704, n. 66; McGovney, *"A Supreme Court Fiction"*, 56 Harv. L. R. 1090, 1111-15. Rule 82, F. R. C. P. prohibits such device for the expansion of District Court jurisdiction, *Sturgeon* v. *Great Lakes Steel Corp.* (6th Cir.), 143 Fed. 2d 819, certiorari denied 323 U. S. 799.

specific identifiable property which the trustee can be compelled to convey is a condition precedent to the imposition of the constructive trust, has been held by the highest courts of the forum with which, at least in principle, the holding below is in conflict. *Coane* v. *American Distilling Co.*, 298 N. Y. 197; *Fur Wool Trading Co. Ltd.* v. *Fox, Inc.*, 245 N. Y. 215.[19]

The passing reference to the application of a hybrid class action to a fund held in constructive trust, in *Pennsylvania Co. for Ins., etc.* v. *Deckert* (3d Cir.) 123 Fed. 2d 979, 985, relied on by the Court of Appeals, is here without force, since the fund referred to in that case was monies then in existence, in the hands of a party to the action, but which had no personal claim thereto, segregated from its own assets in the form of trust funds. The Court of Appeals decided this case as though the $176,000 paid the petitioner (he actually received only $119,000) (660-62) in 1926, had been paid over into the hands of a receiver after suit, as in *Leadville Coal Co.* v. *McCreery,*[20] and *Richmond* v. *Irons,*[21] typical hybrid class suits cited by the court below, where the Court's power over the *res* in fact was absolute and dispositive; and what is more, the $233,000 for interest on the $176,000, part of the judgment awarded (1752), was treated in the same fashion.

4. But even if a hybrid class suit theory applies, the judgment below transcends any precedent and violates, it is submitted, basic due process requirements in that it adjudicates and bars the prosecution of the personal separate rights of the 89 absent claimants (1738, 1767), de-

[19] Each of the cases cited by the court below (R. 1078, 1079) involved specific identifiable or traceable properties. See 3 Scott on *Trusts*, § 462; § 462.3, pp. 2318-19; § 508.2, p. 2438; § 518, p. 2484.

[20] 141 U. S. 475.

[21] 121 U. S. 27.

spite an indisputable lack of jurisdiction *in personam* as to them. A hybrid class action, insofar as it operates in *rem*, is conclusive to all members of the class; insofar as it is *in personam*, it does not bind those who are not parties. 3 Moore, *Federal Practice*, 2d ed. ¶23.11 [4] p. 3468.[22]

But the judgment below goes even further. It in effect transfers the separate and personal claims of the 89 absentees (including the 32 who never received notice) to the 72 claimants who had appeared and prosecuted (1735; 1737; 1752; 1754-67). If this principle were valid, it would mean that if only, let us say, 3 out of the 161 Subscribers had appeared, the Court could award them the judgment for the entire $409,000, though their *pro rata* share of the $176,000 was no more than $10,000. The error is demonstrated by the very excess of the judgment below over the total of the recoveries, had each of the 72 brought an independent suit for his proportionate share of the alleged misappropriation. The class action cannot constitutionally and in justice serve as a means of creating a bonanza for the plaintiffs and a method of inflicting punishment upon the defendant.

Petitioner was thus doubly wronged. First, he was deprived of the implicit relinquishment and abandonment of 89 claims (R. 1078) which should have served to reduce petitioner's liability *pro tanto*;[23] and secondly, it left petitioner in a position of double jeopardy in that, to the extent of the claims of such absent members if not abandoned, he might be required to pay twice. In a suit against petitioner by such absent members, it would be held that barring their several claims without jurisdiction over them *in personam*, was a nullity, particularly since the notice

[22] Likewise in a spurious class action the judgment is not *res adjudicata* as to non-joiners. See cases cited by court below (R. 1077, fn. 3).

[23] If no class action has been brought, such would manifestly have been the result.

to the absent members, of the opportunity to intervene and assert their claims in the District Court, contained no warning that upon failure to do so, their claims would be barred,[24] and that as to some of them, such notice was never delivered (997-8; 1007-11; 1510-18; R. 323-54).

5. In *Mason* v. *Henry*, 152 N. Y. 529, the Court of Appeals of the State of New York held that in an action for fraud, governed by the statute of limitations now embodied in New York Civil Practice Act, §48(5) (*supra*, p. 3), whereunder the action is barred six years after plaintiff's discovery of the fraud, the statute of limitations having been pleaded, the burden is upon the plaintiff of proving that the fraud was not discovered until within six years of the commencement of the action, for, as the Court says, at page 539:

> "If this were not so, the defendant would have to prove a knowledge in the plaintiff which, in most cases, would be impossible. The burden of showing that the running of the statute had been arrested ought to be upon the plaintiff; as was the rule in equity."

Hence, in individual actions by the Subscribers on their respective and several claims, each would have had the burden of establishing when he first discovered the facts. The Court of Appeals below, in direct conflict with this New York law, held* that in class actions, as to members of the class who intervened after institution of the action by the class representatives and an interlocutory judgment in favor of the class generally, this burden of proof shifted to defendant, at least to the extent of rebutting

[24] If the subscribers who received notice had checked the law, they would have found, as presumptively they did, the unanimity of authority in the Second Circuit, that members of the class who failed to intervene in a spurious class suit (and the District Court, by whose direction the notice had been sent, had so described it), are not barred by any determination therein as to their rights *in personam* against the defendant (R. 1077, fn. 3).

* R. 1081.

the presumption that the times of the discovery of the facts by the class representatives were *prima facie* the dates of the discovery by the originally absent members of the class, a task which, in the language of *Mason* v. *Henry*, "in most cases, would be impossible". Such presumption is a creation of the Court of Appeals below. It is totally without precedent and is in direct conflict with such cases in its own circuit, as *Miller* v. *National City Bank*,[25] *Hackner* v. *Guaranty Trust Co.*,[26] and *Ayer* v. *Kemper*,[27] wherein it was held that in class actions for common law fraud and deceit, the burden of proof is upon each member of the class to establish his reliance upon the misrepresentations. The dictum in *York* v. *Guaranty Trust*,[28] cited below (R. 1081) is not to the contrary, for there the action was not one for common-law fraud but for breach of fiduciary duty and the quoted New York statute of limitations was not involved.

Furthermore, a class representative in a hybrid and spurious class suit is not truly a representative; he actually represents no one but himself. 3 Moore, *Federal Practice*, 2d ed., ¶23.07 [1], at p. 3425. In the nature of things he cannot be representative, even *prima facie*, as to the personal factors of deception, reliance, knowledge and discovery of the facts.

Here petitioner had controverted each individual intervening claimant's lack of knowledge and raised the other personal issues, not by affidavit, as the Court of Appeals held should have been done (R. 1081) but by answer (1246-63) as the trial Court directed (972), thereby putting each particular claimant to his proof (1514).

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[25] 166 Fed. 2d 723, 728 "Reliance is a factor personal to each" member of the class on whose behalf a spurious class suit for fraud based on misrepresentation was brought.

[26] 117 Fed. 2d 95, certiorari denied 313 U. S. 559.

[27] 48 Fed. 2d 11, 14, 15, certiorari denied 284 U. S. 639.

[28] 143 Fed. 2d 503, reversed on other grounds, 326 U. S. 99.

6. Petitioner's answer to the claims of the subsequent intervenors demanded a trial by jury of the issues raised thereby[29] (1262-63). Plaintiff served a notice to take the deposition of certain of the subsequent intervenors pursuant to Federal Rule 26 (1282-1350). The demand and notice were vacated (1264-66; 1333-35). These orders were sustained by the Court of Appeals upon two grounds: (1) that petitioner could not, after the interlocutory decree, relitigate his duty to the class as a whole, and that there was then left only the fixing of rights *inter se;* and (2) that a class suit is an equity device (1080). As to "1", plaintiff's answer to the individual claims did not seek to relitigate any of the common questions of law and fact which were before the Court in the trial preceding the interlocutory decree; an examination of the answer shows that it is limited to the issues personal to each particular claimant.* Further, the very order of the trial Court providing for petitioner's answer to such individual claims, after the interlocutory decree (972), recognizes that petitioner could raise such issues and that the subsequent trial in which in fact petitioner vigorously participated (1412), was not to be limited to a disposition of the rights of the claimants *inter se,*[30] but was to include the very issues

[29] The fact that the trial prior to the interlocutory decree was had to the court alone has no bearing. "The form of trial is determined for each issue, not for the action as a single unit." *Sherwood* v. *U. S.* (2d Cir.), 112 Fed. 2d 587, 591, rev. on other grounds, 312 U. S. 584; see, also, *Branknit Mills* v. *Eday Fabric Sales Corp.* (2d Cir.), 124 Fed. 2d 563.

[30] The Court of Appeals cites the phrase used by this court in *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507, at 515, that the trial court had reserved in the interlocutory decree "essentially supervisory jurisdiction over distribution among the class of the recovery awarded", but what was there said related solely to the question before the court as to whether the reservation of jurisdiction by the trial court as to the issues involving the Rinke Agency subscribers affected Petroleum Conversion Corp., the rival claimant in the triangular controversy, and was only antecedent to the almost directly following conclusion "Petroleum no longer has any concern with these questions". Furthermore, this court did not have in the record then before it the order of the trial court for the interposition of answers to the claims of the subsequent interveners and the trial of the issues resulting therefrom (967-975).

* R. 416-21.

arising out of petitioner's answer. Indeed, the Court of Appeals itself acknowledges the possibility of such issues and outlines the mechanics for their disposition (R. 1080-81). The interlocutory judgment could properly adjudicate only the common questions of law and fact, not the issues personal to the absent members of the class.

As to "2", the fact that this was a class action does not make it an equity suit. A class action at law will lie *Independent Shares Corp.* v. *Deckert,* 3 Cir., 108 Fed. 2d 51, reversed on other grounds, 311 U. S. 282. Such a class suit though "coming straight from equity" cannot deprive a defendant of his constitutional right to trial by jury. See *General Ins. Co.* v. *Goldstein,* 45 N. Y. Supp. 2d 570 (not officially reported); *Georgia Power Co.* v. *Hudson,* 4th Cir., 49 Fed. 2d 66, 68, 69; *Farmers Coop. Oil Co.* v. *Socony Vacuum Oil Co.* [D. C. Iowa], 43 Fed. Supp. 735, mod. on other grounds, 133 Fed. 2d 101. And such, too, must be the effect of Federal Rule 38. The trial and preparation for trial by depositions pursuant to Federal Rule 26 should be no different as to each of the several claims of these subsequent intervenors than if they had, as they could have, instituted independent actions.

These important questions affecting the fundamental right of jury trial in a class suit under the Federal rules and the construction of Rules 26 and 38 in relation thereto warrant, it is respectfully submitted, that a writ be here granted in order to effect authoritative disposition thereof.

B

The decision by the Court of Appeals should also be reviewed by reason of the fact that it is in conflict with the decisions of the highest courts of the forum, on the important issue of the statute of limitations. As the trial

Court held, unless this stale claim, asserted more than seventeen years after the event "comes within the purview of the New York Civil Practice Act § 48(5), it is barred by the other sections and subdivisions of the Practice Act relating to limitations of actions" (592). Section 48(5) above quoted at page 3, provides that an action for fraud is barred unless commenced within six years of the discovery thereof. Here, the facts were allegedly discovered just short of six years before suit (28-30).

Under the State decisional law, Section 48(5) does not govern unless actual, common-law fraud, as distinguished from constructive or equitable fraud, is the *sine qua non* of recovery. *Hearn 45th St. Corp.* v. *Jano*, 283 N. Y. 139, 141; *Teich* v. *Lawrence*, 291 N. Y. 245. It is the reality and essence of the action which controls. *Brick* v. *Cohn-Hall-Marx*, 276 N. Y. 259, 263. As the trial Court puts it, "where fraud is only incidental to the action or where some other remedy is equally adequate, then Section 48(5) is not applicable" (593). Stripped to its essentials, Subscribers' claim, as found by the trial Court, is that petitioner and the defendant Lloyd, appropriated $176,000 of the Subscribers' money through the connivance of their fiduciary Rinke (653, 738). Restitution of an unjust enrichment is the essence of the claim and an action for money had and received affords an "equally adequate remedy". *U. S.* v. *Jefferson*, 291 U. S. 386, 403; *Meyer* v. *Hurley Motor Co.*, 273 U. S. 18, 24; *Cohen* v. *City Company of New York*, 283 N. Y. 112, 117; Restatement, *Restitution*, pp. 23, 523.

Thus, Civil Practice Act, § 48(5) does not govern an action to recover secret profits though secured by fraudulent means and in breach of fiduciary duty. *Hastings* v. *H. M. Byllesby*, 293 N. Y. 404, 411; certiorari denied 324 U. S. 860; *Gobel, Inc.* v. *Hammerslough*, 263 A. D. 1, aff'd 288 N. Y. 653; *Wechsler* v. *Bowman*, 285 N. Y. 284, 293-4;

Dunlop's Sons, Inc. v. *Dunlop,* 259 A. D. 233, aff'd 285 N. Y. 333; *Frank* v. *Carlisle,* 261 A. D. 13, aff'd 286 N. Y. 586. It does not apply to an action against a corporate officer to recover funds misappropriated or embezzled by him. *Gottfried* v. *Gottfried,* 269 A. D. 413, 418; *Meyer* v. *Meyer,* 271 A. D. 465, 476; *Cwerdinski* v. *Bent,* 256 A. D. 612, aff'd 281 N. Y. 782. Likewise, in an action against a trustee *ex maleficio,* the statute runs from the time of the wrong and not from its discovery. *Wood* v. *Young,* 141 N. Y. 211; *Mills* v. *Mills,* 115 N. Y. 80; *Lammer* v. *Stoddard,* 103 N. Y. 672; *Hart* v. *Goadby,* 72 Misc. 232 (LEHMAN, *J.*).

An action, complete and sufficient in itself, cannot by the addition of elements of deceit be converted into an action for actual fraud within Section 48(5) so as to avoid the bar of another statute of limitations. *Carr* v. *Thompson,* 87 N. Y. 160; *Gobel, Inc.* v. *Hammerslough, supra; Pollock* v. *Warner Bros.,* 266 A. D. 118; *Guild* v. *Hopkins,* 271 A. D. 234, 244, 245, aff'd 297 N. Y. 477.

In this case the Court of Appeals spelled out an action for fraud on the basis, unsupported by any trial Court finding, or the record,[31] that the Subscribers were induced to subscribe, by statements as to the use to which their subscriptions were to be put, which were false in that they were used for the profit of petitioner (R. 1080-81). But the Court of Appeals had held a few pages before that the gist of the action was a constructive trust (R. 1078).

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[31] The statements in the subscription agreements specifically informed the subscribers that the subscription monies were to be used to buy the plant from the purchaser thereof at the lien foreclosure sale, for the new company (2746-56). The subscribers were each advised that petitioner was such purchaser (2575-77; 478). The petitioner, a non-fiduciary (594) had paid $87,310 plus an undertaking for a like amount of stock of the new company (2289). He had no obligation to resell without a profit and the subscribers could not reasonably expect him to (*infra,* pp. 29-30). The subscribers' agreements did not say otherwise (2746-56). Dickinson would have no responsibility for any misrepresentations in the subscription forms. *Wiser* v. *Lawler,* 189 U. S. 260. In fact, there were no misrepresentations therein, or elsewhere.

C

The affirmance by the Court of Appeals that the Subscribers did not have knowledge of the payments to petitioner flies in the face of decisions both of this Court and of the New York Court of Appeals, since the documentary and uncontroverted evidence shows that the Subscribers were put upon inquiry and were charged with knowledge of the facts in 1926 as a matter of law. The purchase price paid by petitioner at the lien foreclosure sale, was a matter of public record. *Babcock* v. *Tam*, 9 Cir., 156 Fed. 2d 116; *U. S.* v. *Christopher*, 10 Cir., 71 Fed. 2d 764; *Little* v. *Haas*, 68 Fed. Supp. 545 (D. C. Ga.) The Subscribers were expressly informed by recitals in the subscription agreements and by letter, of the lien foreclosure sale and of the purchase of the plant by petitioner (2747; 2752; 249; 478-80; 2575-77) through his own means (479; 2576), and the plan to repurchase it from whoever purchased it at the lien foreclosure sale (2746-49) for the new corporation, through the Agent, with Agency funds (478-80). The Agent, in the subscription agreements, expressly agreed to apply the monies thereunder for the acquisition of said plant or an interest therein (2734-35; 2748; 2754-55), and thereafter, a letter dated July 1, 1926 to all of the Subscribers informed them of the balance due for "liens" to be paid by the Agent (480) in the amount approximately then due petitioner (659-62) pursuant to the agreement to pay him from Agency funds the exact amount of the liens which had been foreclosed (*supra*, pp. 11-13). The subscription agreements did not make any representations in words or in substance, that the foreclosed plant was to be reacquired without payment of any profit to the vendor (R. 912, 916-19). Patently, one, not a fiduciary (594) who had bought in a plant on a sale to satisfy a $174,000 judgment, with the expenditure of one-half that

sum in cash, plus an undertaking to deliver a like amount of stock would not resell and would not be expected to resell, without a profit.

Despite many opportunities for inquiry (2018-20; 2027-28; 2126; 2592), there is neither finding nor proof that any Subscriber was misinformed as to any of the facts. 158 of the 161 Subscribers failed to testify, and the other three merely claimed ignorance (2016-51; 2113-27; 2926).

Certainly, the insiders knew the facts. 18 of the 161 Subscribers who paid almost half of the total subscriptions (2784), men of outstanding business and professional experience (2518-20) were the overwhelming majority of both the Boards of the old and new companies (2281-82; 2709; 2784) and the entire Bondholders Protective Committee which sponsored the reorganization (661-62; 2746-47; 2752-53). The failure of the Court below to hold, under these circumstances, that the Subscribers were at least put upon inquiry or were guilty of such negligent ignorance as to be equivalent to actual knowledge, runs counter to *Hammond* v. *Hopkins*, 143 U. S. 224, 251; *Fidelity & Deposit Co.* v. *Queens County Trust Co.*, 226 N. Y. 225, 233; and *Sielcken-Schwartz* v. *American Factors, Ltd.*, 265 N. Y. 239.

D

The Court of Appeals below, in still another respect, decided an important question of local law in a way probably in conflict with the applicable local decisions. It held that the release to one joint tort-feasor was not available as a defense to the other joint tort-feasors because as to them it was wholly gratuitous (R. 1080).

The common law rule that a release to one joint tort-feasor releases the others has long prevailed in New York.

Barrett v. *Third Avenue Ry. Co.*, 45 N. Y. 628, 635; *Milks* v. *McIver*, 264 N. Y. 267, 269; *McNamara* v. *Eastman Kodak Co.*, 232 N. Y. 18, 23, 25. The logic of the rule is that though joint tort-feasors are severally liable, the tort and its consequences are single and indivisible, and in absence of reservation, there can be but one satisfaction. *Walsh* v. *N. Y. C. & H. R. R. Co.*, 204 N. Y. 58, 62. That the release is gratuitous as to the other joint tort-feasors, is thus irrelevant to the principle involved. Moreover, in New York, by statute, a release in writing is effective though lacking consideration.[32] Debtor and Creditor Law, § 243 (L. 1936, c. 222); Personal Property Law, § 33, subd. 2 (L. 1936, c. 281).

So far as our research reveals, this holding is unprecedented. The authorities cited in the opinion (R. 1080) go no further than to support the general rule that a release requires a consideration; joint tort feasors were not involved and certainly not the question whether a release of a joint tort-feasor releases the others even though as to them the release is gratuitous. A review by this Court seems necessary to preclude the confusion and uncertainty in the local law on this issue which would flow from the precedential effect of this decision.

E

The Court of Appeals held that the misappropriation of the $176,000 damaged the Subscribers, an essential element of their cause of action for fraud and deceit (R. 1081).

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[32] The releases given in 1938 by the subscribers to Rinke expressed a specific consideration (2410). *Lawrence* v. *McCalmont*, 2 How. 426, 452. This was the manner of distribution of the stock to which the subscribers acknowledged they were not entitled (2405; 2412). The subscribers, with admitted knowledge of all the facts since 1938 (29), failed to seek rescission of the release and thus rescission is barred. *McNamara* v. *Eastman Kodak Co.*, 232 N. Y. 18. Even if avoidable, the release remains effective as a release of other joint tort-feasors until rescinded. *Magnolia Petroleum Co.* v. *McFall*, 178 Ark. 596, 12 S. W. 2d 15.

That determination seems probably in conflict with local law and the great weight of authority. The misappropriation, if misappropriation there was, damaged Petroleum and not the Subscribers. The Rinke Agency, after Knox was wiped out, was a capital-raising device (R. 1072) for the benefit of Petroleum. The subscription agreements themselves provided for the expenditure of monies paid thereunder for specified and "other corporate purposes" or payment over by Rinke to Petroleum for its stock (2748-49; 2754-56). The Subscribers accepted receipts for their monies, entitling them only to stock therefor (1521-23). There has never been a rescission by the Subscribers of such subscription agreements or return of such stock received. By the issuance of the $1,200,000 par of stock for the Subscribers, exactly equal to the total $600,000 subscribed at "two for one" (508-9; 669; 675; 681; 1523-24; 2267-68), Petroleum became entitled to the monies paid to Rinke by the Subscribers for such stock and not expended by him in accordance with the subscription agreements. *Stewart* v. *King*, 85 Ore. 14, 166 Pac. 55, 57; *San Joaquin L. & W. Co.* v. *West*, 94 Cal. 399, 29 Pac. 785; *Gulf Coast Western Oil Co.* v. *Trapp*, 165 Fed. 2d 343, 350 (10th Cir.).

Rinke paid over to Petroleum the subscription monies in his hands at the time of its organization (1938-39) as well as such monies thereafter received (1941; 1947-53; 1959; 2398).

Contrary to the position of the District Court (466), no express assignment or transfer to Petroleum of the claim for the alleged misappropriation was needed since Petroleum was the third party beneficiary of such agreements and the real party in interest. *Coleman Hotel Co.* v. *Crawford*, 3 S. W. 2d 1109 (C. A., Texas); *Horseshoe Pier Amusement Co.* v. *Sibley*, 157 Cal. 442, 108 Pac. 308; 4 Fletcher, *Cyc. Corporations*, § 1442, p. 115. There is an

assignment by operation of law. "In reality, it is a matter of succession, not transfer". *American Shipbuilding Co.* v. *Commonwealth S. S. Co.* (6th Cir.), 215 Fed. 296, 299. Thus, a corporation, and not its subscribers, is entitled to recover for pre-incorporation fraud inducing the subscribers to subscribe and the purchase of property for the corporation with their monies. *Arnold* v. *Searing*, 73 N. J. Eq. 262, 67 Atl. 831. Alternatively, it is entitled to rescission for such fraud and the recovery of the subscribers' money paid on account. *American Shipbuilding Co.* v. *Commonwealth S. S. Co., supra* Similarly, it is the corporation which is entitled to recover pre-incorporation secret profits out of stock subscription monies. *Edenborn* v. *Sim* (2d Cir.), 206 Fed. 275; *Koppitz-Melchors, Inc.* v. *Koppitz*, 315 Mich. 582, 24 N. W. 2d 220; *Ex-Mission L. & W. Co.* v. *Flash*, 97 Cal. 610, 32 Pac. 600.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be granted.

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